

**Kentucky State District Council of Carpenters
(Wehr Constructors, Inc.) and Andrew J. Russell,
Attorney at Law. Case 9-CD-464**

September 30, 1992

**DECISION AND DETERMINATION OF
DISPUTE**

BY CHAIRMAN STEPHENS AND MEMBERS
DEVANEY AND RAUDABAUGH

The charge in this Section 10(k) proceeding was filed on May 13, 1992, by Andrew J. Russell, attorney at law, who represents the Employer, Wehr Constructors, Inc. (Wehr). The charge alleged that the Respondent, Kentucky State District Council of Carpenters (Carpenters), violated Section 8(b)(4)(D) of the National Labor Relations Act by engaging in proscribed activity with an object of forcing Wehr to assign certain work to employees represented by the Carpenters rather than to employees represented by Kentucky Laborers District Council (Laborers).¹ The hearing was held on June 2 and 3, 1992, before Hearing Officer Damon W. Harrison Jr. The Employer and the Carpenters have filed posthearing briefs.

The National Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board affirms the hearing officer's rulings, finding them free from prejudicial error. On the entire record, the Board makes the following findings.

I. JURISDICTION

The Employer is engaged in the commercial construction industry as a general contractor and construction manager. During the 12 months preceding the hearing, the Employer had gross revenues in excess of \$500,000, and it purchased and received goods and materials which were valued in excess of \$50,000 and were shipped directly to it from points outside the Commonwealth of Kentucky. We find that the Employer is engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Carpenters and the Laborers are labor organizations within the meaning of Section 2(5) of the Act.

II. THE DISPUTE

A. Background and Facts of Dispute

Wehr has been building a new sanctuary and parking garage for St. Margaret Mary's Church in Louisville, Kentucky. Wehr rented reusable aluminum forms for casting the concrete beams in the sanctuary. The casting process involves the construction of forms, the pouring of concrete, and, once the concrete has set, the dismantling or "wrecking" of the forms.

¹ The Laborers' name appears as amended at the hearing.

Wehr's project superintendent was Richard Pennick. He had the independent authority to hire and fire, to assign work to, and to adjust the grievances of all of Wehr's jobsite employees, including carpenters and laborers. Pennick assigned the building of the forms to employees represented by the Carpenters, the pouring of the concrete to employees represented by the Laborers, the wrecking of forms to be reused on the jobsite to employees represented by the Carpenters, and the "final" wrecking of forms which were not to be reused on the jobsite to employees represented by the Laborers.

In January 1992, Ron Herp, business service representative for Carpenters Local 64, visited the jobsite. Herp told Pennick that employees represented by the Laborers should be wrecking the forms only if the material was to be discarded; otherwise, employees represented by the Carpenters should wreck the forms. In response, Pennick commented that since Wehr had rented aluminum forms, no forms would be discarded. In Herp's view, this meant that employees represented by the Carpenters should perform all the wrecking.

On February 24, 1992, Herp filed a grievance against Wehr for not assigning the final wrecking to employees represented by the Carpenters. Wehr's attorney advised the Carpenters that Wehr had no obligation to submit the matter to arbitration because there was no collective-bargaining agreement in effect.

Superintendent Pennick was a member of the Carpenters. On April 22, 1992, a letter from Carpenters' secretary-treasurer/business manager Steve Barger advised Pennick that charges had been filed against him and that the District Council had scheduled a trial for May 16, 1992. Attached copies of the charges and an internal union memorandum show that charges resulted from Pennick's assignment of final wrecking work to Laborers at the church jobsite.

Pennick refused to appear for the scheduled trial. He subsequently received another letter from Barger directing Pennick to appear for a reading of the verdict in his trial. The record does not indicate what that verdict was.

B. Work in Dispute

The work in dispute involves the final wrecking of aluminum gang forms which are not to be reused at the site of the Employer's St. Margaret Mary's Church project located at 7813 Shelbyville Road, Louisville, Kentucky.

C. Contentions of the Parties

Wehr contends that there is reasonable cause to believe that the Carpenters violated Section 8(b)(4)(D) of the Act and that the Board must therefore determine the merits of the dispute. Wehr further contends the work in dispute should be assigned to employees rep-

resented by the Laborers on the basis of its own and area past practices and the economy and efficiency of operations.

The Laborers contends that employees which it represents should be awarded the work in dispute on the basis of industry past practice and its interpretation of a 1949 agreement between the Internationals of Laborers and Carpenters. The Carpenters contends that employees that it represents should be awarded the work in dispute on the basis of its interpretation of the 1949 agreement, industry past practice, and relative skills and safety.

D. Applicability of the Statute

Before the Board may proceed with a determination of the dispute pursuant to Section 10(k) of the Act, it must be satisfied that there is reasonable cause to believe that Section 8(b)(4)(D) has been violated and that the parties have not agreed upon a method for the voluntary adjustment of the dispute.

It is undisputed that the Carpenters seeks the reassignment of the work in dispute from employees represented by the Laborers to employees represented by the Carpenters. It is also undisputed that the Carpenters brought internal disciplinary charges against Pennick in furtherance of its reassignment objective. The Board has held that the bringing of disciplinary charges against a person engaged in commerce who is a union member constitutes coercion within the meaning of Section 8(b)(4)(ii) of the Act. *Sheet Metal Workers Local 104 (Losli International)*, 297 NLRB 1078, 1087–1088 (1990) (union charges against company president); *Laundry & Dry Cleaners Local 209 (East Bay Counties Dry Cleaners Assn.)*, 167 NLRB 45, 51–52 (1967) (union charges against independent contractor).² We therefore find reasonable cause to believe that a violation of Section 8(b)(4)(D) has occurred. Furthermore, there is no evidence that all parties have an agreed method for voluntary adjustment of the dispute. Accordingly, we find that the dispute is properly before the Board for determination.

E. Merits of the Dispute

Section 10(k) requires the Board to make an affirmative award of disputed work after considering various factors. *NLRB v. Electrical Workers IBEW Local 1212 (Columbia Broadcasting)*, 364 U.S. 573 (1961). The Board has held that its determination in a jurisdictional dispute is an act of judgment based on common sense

and experience, reached by balancing the factors involved in a particular case. *Machinists Lodge 1743 (J. A. Jones Construction)*, 135 NLRB 1402 (1962).

The following factors are relevant in making the determination of the dispute.

1. Certifications and collective-bargaining agreements

On August 4, 1989, the Board certified the Carpenters as the exclusive representative of a unit of all journeymen and apprentice carpenters working for the Employer at jobsites in Kentucky. The bargaining unit description in the certification makes no reference to the work in dispute. There are no certifications applicable to the Employer's employees who are represented by the Laborers.

Wehr and the Laborers are parties to a current collective-bargaining agreement, which is effective from July 1, 1988, through June 30, 1993. Article V of this contract states that it is meant "to embrace building construction, including . . . wrecking." Wehr and the Carpenters were parties to a collective-bargaining agreement which expired on May 31, 1989, prior to the representation election proceeding which resulted in the aforementioned certification of the Carpenters. Article 1.4(a) of the expired contract stated that its terms were applicable "generally but not strictly limited to building construction, parking lot construction, and all alterations, remodeling, maintenance repairs, and wrecking work performed by the Employer."

Based on the foregoing, we find that the factor of Board certifications and collective-bargaining agreements does not favor the jurisdictional claim of employees represented by one union over those represented by the other union.

2. Agreements between the Unions

In 1949, the International Unions of the Carpenters and the Laborers executed a jurisdictional memorandum of agreement on concrete forms. In relevant part, the memorandum stated:

1. On stripping of panel forms to be re-used again, the releasing shall be done by members of the United Brotherhood of Carpenters and Joiners of America.

2. The moving, cleaning, oiling and carrying to the next point of erection, and the stripping of forms which are not to be reused . . . shall be done by members of the [Laborers].

As previously stated, the Carpenters claims that the memorandum of agreement entitles employees represented by it to perform all wrecking work on forms which are to be reused either on the same jobsite or elsewhere. Wehr and the Laborers claim that the memorandum of agreement entitles employees rep-

² "Coercion" within the meaning of Sec. 8(b)(4)(ii) broadly includes "nonjudicial acts of a compelling or restraining nature, applied by way of concerted self-help consisting of a strike, picketing, or other economic retaliation and pressure in the background of a labor dispute." *Sheet Metal Workers Local 48 v. Hardy Corp.*, 332 F.2d 682, 686 (5th Cir. 1964), cited with approval in *United Scenic Artists Local 829 (Theatre Techniques)*, 267 NLRB 858, 863 (1983).

resented by the Laborers to perform final wrecking work on forms which are not to be used again at the same jobsite. We find that the language of the memorandum arguably supports either of the opposing views. Furthermore, we note evidence that the parties did not contemplate the allocation of wrecking work for reusable aluminum forms, which were not yet in general use, when they executed the 1949 memorandum. Accordingly, we find that this factor does not favor an assignment of the disputed work to the employees represented by either Union.

3. Company preference and past practice

It is clear that the Employer prefers to assign the work in dispute to employees represented by the Laborers. Superintendent Pennick testified that he assigned the work in dispute in accord with his general experience in the construction industry, including 8 years working for Wehr. Carpenters Business Representative Herp and Director of Organizing Lawrence Hujo both testified that they had witnessed employees represented by the Carpenters wrecking reusable aluminum forms for the Employer on past projects, but neither witness identified the work being performed as the specific final wrecking work which is the subject of the current jurisdictional dispute. Therefore, we find the factor of company preference and past practice favors an award to the employees represented by the Laborers.

4. Area and industry practice

Pennick and Laborers Business Manager Paul Barrick Jr., similarly testified that the area practice during their many years of construction industry experience had been for employees represented by the Laborers to perform all final wrecking of forms that were not to be reused on the same jobsite. Barrick also testified that composite crews of Laborers and Carpenters had occasionally been used to perform final wrecking in order to avoid jurisdictional disputes. Carpenters officials Herp and Hujo testified that employees represented by the Carpenters had always wrecked any forms that were to be reused at any location.

In light of the conflicting partisan testimony, this factor does not support an award of the work in dispute to either group of employees.

5. Relative skills and safety

Although witnesses for the Carpenters stated their belief that the Carpenters' formal apprenticeship program assured greater skill and safety in carpenters' work, there is no objective evidence that employees

represented by Laborers cannot effectively and safely perform the work in dispute. Under these circumstances, this factor does not support an award of the work to either group of employees.

6. Economy and efficiency of operations

Job Superintendent Pennick testified that there is no need to retain employees represented by the Carpenters to construct or remodel a form for further jobsite use after the final pour for a particular form has been completed. He further indicated that it is more economical and efficient to retain only employees represented by the Laborers to perform both the final wrecking *and* the subsequent cartage of materials for a form which is not to be reused at the jobsite. We find that this factor of economy and efficiency of operations favors an award of the disputed work to the employees represented by the Laborers.

Conclusions

After considering all the relevant factors, we conclude that employees represented by the Laborers are entitled to perform the work in dispute. We reach this conclusion relying on the factors of company preference and past practice and the economy and efficiency of operations. In making this determination, we are awarding the work to employees represented by the Laborers, not to that Union or its members. The determination is limited to the controversy that gave rise to this proceeding.

DETERMINATION OF DISPUTE

The National Labor Relations Board makes the following Determination of Dispute.

1. Employees of Wehr Constructors, Inc., represented by the Kentucky Laborers District Council are entitled to perform final wrecking of aluminum gang forms which are not to be reused at the site of the Employer's St. Margaret Mary's Church project located at 7813 Shelbyville Road, Louisville, Kentucky.

2. The Kentucky State District Council of Carpenters is not entitled by means proscribed by Section 8(b)(4)(D) of the Act to force Wehr Constructors, Inc. to assign the disputed work to employees represented by it.

3. Within 10 days from this date, the Kentucky State District Council of Carpenters shall notify the Regional Director for Region 9 in writing whether it will refrain from forcing the Employer, by means proscribed by Section 8(b)(4)(D), to assign the disputed work in a manner inconsistent with this determination.